IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 16,062

JAMES N. GREEAR, *Appellant,*

v.

MARY SCHAAFF GREEAR, *Appellee.*

Appeal from the United States District Court for the District of Nevada

---

BRIEF FOR APPELLEE

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INDEX

TABLE OF CASES

STATUTES

TEXT

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under Section 1332, Title 28, and this Court has jurisdiction under Section 1291, Title 28, of the United States Code Annotated.

The complaint alleged that plaintiff is a citizen of the District of Columbia, and defendant a citizen of the State of Nevada. (Tr. 3) The judgment appealed from is in the amount of $39,734.14 plus interest on specified amounts from specified dates and court costs. (Tr. 45-46)

COUNTER-STATEMENT OF THE CASE

Appellant's statement of the case fails to state the crucial facts that when the agreement involved was entered into between the appellant and appellee on July 13, 1949, they were citizens and residents of the District of Columbia, and had been citizens and residents of the District of Columbia for many years. Both of the parties continued to be residents of the District of Columbia for a year thereafter, and the appellee still is a citizen and resident of the District of Columbia. (Tr. 3, 19-20, 31, 39-40, 87-88)

Prior to the action in the United States District Court for the District of Nevada out of which this appeal arose, the appellee filed an action in the Circuit Court of Bath County, State of Virginia, to recover money due and unpaid under the terms and provisions of the agreement involved in this appeal. On February 23, 1955, the Circuit Court of Bath County, State of Virginia, entered a judgment in her favor against the appellant for $10,357.34 plus interest on certain specified amounts from certain specified dates and court costs in that court. In that action, the Virginia court construed the agreement. Its construction was in accordance with the contentions of the appellant. The United States District Court for the District of Nevada followed the construction of the Virginia court. (Tr. 3, 26, 27, 32-37)

Paragraph 4 of the agreement involved defined "net income" as the appellant's "gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income tax payments by him for that year * * *" and provided that if the appellant's annual "net income" computed according to that definition of his net income, fell below a specified sum, the monthly payments to the appellee for the *succeeding calendar year* should be affected in the proportions therein specified. (Tr. 10-12)

QUESTIONS INVOLVED

1. The first question presented is not what is stated on page 5 of appellant's brief to be the first issue. There it is stated as follows: Is the income shown in appellee's Exhibits 4 and 5 community property of appellant and his present wife? The District Court correctly stated in its decision,

> "* * * It may be here said that the Court is concerned only with a determination of the rights of the parties based upon the Virginia judgment and the property agreement. At this point we do not think community property law enters into the picture. What might be the effect of raising that issue after judgment, and at such time as the plaintiff might attempt to satisfy her judgment, is a problem for another day." (Tr. 38)

The District Court also said,

> "* * * It is one of interpretation of paragraph 4 of the agreement. What did the parties intend at the time of the execution of the agreement? Did the agreement as written express the intention of the parties? We think it is clear as to what the parties intended, and further, that the wording of paragraph 4 faithfully recites such intention." (Tr. 35)

2. On page 5 of the brief for appellant, the second issue is stated as follows:

> "If it is community property, should the present wife's share be included in determining 'net income' as defined in the agreement of July 13, 1949?"

This question is not presented. As the District Court said,

> "Defendant asserts that under the law of the State of Nevada, (N.R.S. 123.220) one-half of his earnings and income vested in his present wife and therefore only one-half of his earnings, medical and otherwise, should be used as the base for computing his net worth. Without going into detailed discussion on this

point, and we concede that there can be much academic argument, we reject defendant's contention on this score. By way of illustrating our thinking we cite Alexander v. Alexander, 158 F. 2d 492, and Hutchison v. Hutchison, 119 P. 2d 214. It is obvious that at the time of the execution of the separation agreement the parties did not have in contemplation the vagaries of the law of forty-eight states, nor will this Court write them into the agreement even though the argument is made by defendant's counsel that the sacred provisions of the Nevada community property law should be upheld. * * *'' (Tr. 37-38)

3. The brief for appellant states on page 5 that the third issue is as follows:

> ''Is appellant in fixing 'usual, ordinary and reasonable office expenses' limited to the expenses which were paid by the partnership of which he was a member at the time he signed the agreement?''

This is not the question presented. As the District Court said,

> ''* * * This difference of opinion between the parties is due to the different interpretations placed by the parties on the expression 'net income' appearing in paragraph 4, and which is therein defined * * *.
>
> ''Which computation to accept for the purpose of determining the moneys now due from the defendant to the plaintiff becomes now the problem of the Court. It is one of interpretation of paragraph 4 of the agreement. What did the parties intend at the time of the execution of the agreement? Did the agreement as written express the intention of the parties? We think it is clear as to what the parties intended, and further, that the wording of paragraph 4 faithfully recites such intention.'' (Tr. 34-35)

ARGUMENT

There are many things in the transcript of record showing that the District Court gave most careful consideration and attention to this case and was fully informed of the facts, recognized very clearly the questions presented and

possessed a thorough knowledge and understanding of the law of the case. In fact, the District Court's handling of this case was most commendable. All of this is shown by the District Court's pretrial order, (Tr. 25-30) the colloquy with counsel for appellant during oral argument of the case, (Tr. 113-128), the District Court's decision, findings of fact, conclusions of law and judgment. (Tr. 30-46)

The judgment of the District Court should be affirmed on each and all of the following three grounds:

1. It is well-settled that contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view. This rule has been applied in a case in point. *Alexander* v. *Alexander,* 64 F. Supp. 123, affirmed 158 F. 2d 429, cert. denied, 67 S. Ct. 1086, 330 U.S. 845, 91 L. Ed. 1290. In that case, there was a property settlement agreement entered into in Missouri where the parties both resided. After the settlement was executed, a divorce was obtained in Missouri. Instant action was by the wife, then still a resident of Missouri, against the husband, who was then a resident of Texas, in a Kansas Court. The wife had attached property of the husband in Kansas. The settlement provided $150.00 a month for the maintenance of the wife, and a similar amount for maintenance of the children until maturity, maintenance to the wife to cease upon her death or remarriage. The pertinent part of the settlement provided substantially as follows: That the defendant each year until the wife's death or remarriage would furnish her true copies of his tax returns for the preceding year; and if shown thereby, that the husband should have gross income from any source except capital gain in any calendar year in excess of $7,500, then for every calendar year, the husband should pay to the wife in twelve (12) equal, consecutive monthly installments

a further sum equal to 20 percent of the amount by which said calendar year income of the defendant exceeds $7,500 for further support of the wife. In the Federal Supplement opinion, the court filed findings of fact and conclusions of law. The pertinent conclusions of law are as follows:

> "5. That the meaning of the term 'gross income' as used in the second paragraph of subdivision 'Six' of said property settlement agreement is governed by the law of the state where said property settlement agreement was executed and where such agreement was to be performed and by the intent of the parties to said agreement.
>
> "6. The application of the Texas community property law to gross income received in that state and, particularly, as such application may affect the nature of gross income as shown on federal income tax returns by citizens and residents of that state does not control the meaning of the term 'gross income' as used in the said property settlement agreement executed in Missouri between parties who were citizens and residents of Missouri at the time of the execution of such agreement and which agreement was to be performed in Missouri.
>
> "7. That the meaning of the term 'gross income' as used in the second paragraph of subdivision 'Six' of said property settlement agreement and is applicable to the income which is the subject of this action, is synonymous with 'gross earnings' as ordinarily and commonly used and is not limited or varied by the application of the Texas community property law to the gross earnings or gross income of the defendant."

In 158 F. 2d 429, page 431, the court said:

> "This being a Missouri contract, it must be presumed that when the parties used the term 'gross income' they meant and understood 'gross income' as that term is understood in Missouri and under Missouri law. There can be no doubt what appellant's income was, for instance, in 1943, under the Missouri

law, had he remained in Missouri. Admittedly his income for that year in Missouri was $14,161.42 of which he would then owe to the appellee 20 percent of the excess of that gross income over $7,500.00.

"Of course he could go to Texas, but when he went he did not take the contract with him. It remained in Missouri so to speak, a Missouri contract subject to interpretation under that law. His removal to Texas did not change a Missouri contract into a Texas contract. His obligations under the contract still depended upon the law of Missouri the place where the contract was made. When he executed this contract in Missouri, he fixed his liability under the canopy of Missouri law, and he remains thereunder until the performance of the contract is completed."

Another case in point, in a community property state, is *Hutchison* v. *Hutchison,* 48 Cal. App. 12, 119 P. 2d 214. Here the parties separated in 1928, the husband conveying the house in trust to his wife for life. The income from the sale or lease of the house was to go to the wife for her support. Until such time as the house produced income, she was to receive $300 a month from stock which the husband placed in trust. The action was brought in California for construction of the declaration of trust and of the property settlement. Husband alleged duress in the execution of the trust agreement and property settlement. In 119 P. 2d 217, the court said:

"Upon this record the first question for determination is whether the law of California or the law of Illinois is here applicable. It is well established that the legality of a contract is to be determined by the law of the place where it was made and its interpretation likewise. Civil code sec. 1646; Restat., Conflict of Laws, Sec. 347. If the contract is legal in the state where it was made it will be enforced in another state unless the contract is contrary to the strong public policy of the forum. Restat., Conflict of Laws, Sec. 612. As it appears that the declaration of trust and the property settlement agreement were made in Illinois by citizens of Illinois and for aught that ap-

pears the obligations thereof were to be performed there, it is self-evident that the law of Illinois must control as to their validity and interpretation * * *''

The following cases state generally the rule of law governing the construction of contracts:

In *Liverpool and G. W. Steam Co.* v. *Phenix,* 129 U.S. 397, 453, the court said:

> ''* * * (This court) has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appeared to have had some other law in view. *Cox* v. *United States,* 6 Pep. 172; *Scudder* v. *Union Bank,* 91 U.S. 406; *Pritchard* v. *Norton,* 106 U.S. 124; *Lamar* v. *Micou,* 114 U.S. 218; *Watts* v. *Camors,* 115 U.S. 353, 362.''

In the following cases, the respective states have community property laws:

In *Bernard Gloeckler Co.* v. *Baker Co.,* (Texas-1932) 52 S.W. 2d 912, 914, the court said:

> ''The validity, interpretation, and obligation of contracts depend on the law of the state where the contract originates. *Gautier* v. *Franklin,* 1 Tex. 732. Judge Wheeler in *Hays* v. *Cage,* 2 Texas 501, quotes from Chief Justice Shaw in *Bulzer* v. *Roche,* 11 Pick. (Mass. 32) 22 Am. Dec. 359; *Bank of U. S.* v. *Donnally,* 8 Pet. 361, 8 L. Ed. 974: 'The authorities, both from the civil and the common law concur in fixing the rule that the nature, validity and construction of contracts is to be determined by the law of the place where the contract is made; and that all remedies for enforcing such contracts are regulated by the law of the place where such remedies are pursued.' * * *''

In *Forgan, et al.* v. *Bainbridge,* 34 Ariz. 408, 274 P. 155, 158, the court said:

> ''* * * The law as to the validity and interpretation of personal contracts is that of the place where they

were made, the lex loci contractu, unless the parties thereto intended they should be governed by the law of some other place. *Bank of Augusta* v. *Earl,* 13 Pet. 519, 10 L. Ed. 274, *Davis* v. *G. M. & St. Paul Ry. Co.,* 93 Wis. 470, 57 N.W. 16, 1132, 33 L.R.A. 654, 57 Am. St. Rep. 935; 5 R.C.L. 931.* * *"

In *Hayter* v. *Fulmore,* 66 Cal. App. 2d 554, 152 P. 2d 746, 748, the court said:

"* * * It is the general rule of contracts that the lex loci contractus, or the place where the agreement is made, determines the nature, validity and the construction of the instrument, unless it appears therefrom that it is to be performed in another state. * * *"

In *Metropolitan Life Insurance Co.* v. *Haack,* 50 Fed. Supp. 55, 61 (La. 1943), the court said:

"The general rule is that the law of the place where a contract is made or entered into governs with respect to its nature, validity, application, and interpretation. * * *"

In *Weber Showcase and Fixture Co.* v. *Waugh,* 42 F. 2d 515, 519 (Washington, 1930), the court said:

"* * * It is fundamental that a contract is to be interpreted according to the lex loci contractus, * * *."

2. The intention of the parties is shown by the facts and circumstances surrounding the execution of the contract, and their intention is clearly expressed in the language of the contract. The District Court so found. (Tr. 35 and 41-42) Among other things, the District Court found that the contract defined "net income" as "gross income from all sources of his income, less his usual, ordinary and reasonable office expenses and income tax payments for that year * * *." The District Court also found that the term "usual, ordinary and reasonable office expenses" at the time and place and under the circumstances that the contract was entered into, did not include such items as dues

and memberships, entertainment, medical journals, insurance, interest, depreciation and automobile expense. (Tr. 34-37 and 41-42) These findings by the District Court are supported by the evidence (Tr. 87, 94-95, 105-106 and 133-134)

Rule 52 of the Federal Rules of Civil Procedure provides that "* * * Findings of fact shall not be set aside unless clearly erroneous, * * *"

On the other hand, the appellant's contentions are not supported by the language of the contract or by the evidence.

The appellant, in computing his "net income" did not compute it according to the definition of "net income" contained in the agreement between the parties. Instead, he computed it according to the definition of "net taxable income" under the Federal income tax laws. The contract did not permit the defendant to adopt his own ideas concerning what constitutes his "net income". The contract defines his "net income." The definition in the contract is binding on the parties and the Court the same as other terms and provisions of the contract are binding on the parties and the Court.

Similarly, the appellant, in making deductions from his gross income, did not limit them to "office expenses," as provided in the contract. Under the terms of the contract, expenses allowable as deductions are limited to "office expenses." No other kind of expense is deductible in determining his "net income." The contract also limits "office expenses" to "usual, ordinary and reasonable office expenses" within the intention of the appellant and appellee at the time the agreement was entered into. At that time, the appellant was a member of a medical partnership in Washington, D. C., and his office expenses were paid by the partnership. Obviously, the parties referred to those office expenses. Consequently, the question of fact in the

District Court was: What were "usual, ordinary and reasonable office expenses" at the time the agreement was entered into? As hereinbefore shown, the District Court found as a fact from the evidence that they did not include such items as dues and memberships, entertainment, medical journals, insurance, interest, depreciation and automobile expense. (Tr. 35-36)

To be entitled to the additional deductions that he claimed, the appellant was required to show that they were "usual, ordinary and reasonable office expenses" within the meaning of that term at the time the agreement was entered into. The burden of proof to show this was on the defendant. The facts and figures were within his records and knowledge. *United States* v. *Denver and R. G. R. Co.,* 191 U.S. 84, 48 L. Ed. 106, 24 S. Ct. 33, *Greenleaf* v. *Birth,* 6 Pet. (U.S.) 302, 8 L. Ed. 406, 20 Am. Jur. 145-146, paragraph 140.

Moreover, the agreement was so framed that the burden of proof was on the defendant to prove that his annual net income fell below $17,500 in the calendar year preceding the calendar year in which he claimed he was obligated to pay an amount lesser than $600 per month. The agreement obligates him to pay $600 per month commencing as of a given date and continuing during the joint lives of the parties. The appellant's promise to pay $600 per month continues until he comes forward and proves that his annual net income fell below $17,500 in the calendar year preceding the calendar year in which he claims his obligation to pay the appellee is an amount lesser than $600 per month.

Furthermore, the pleadings are so framed that the burden of proof was on the appellant to prove that his annual net income fell below $17,500. See appellant's separate answer and affirmative defense, paragraph II, and 20 Am. Jur, 142, paragraph 137. (Tr. 23-24)

In its decision, the District Court said:

> "* * * We feel that our conclusion in this respect is buttressed by the manner in which the term 'net income' was anchored into the agreement, it being there defined as 'gross income from all sources of his income, less his *usual, ordinary and reasonable* office expenses and income tax payments for that year.' (Italics ours.)" (Tr. 37)

3. The judgment of the Virginia court is *res judicata* as to the question of interpretation of the contract.

The District Court said in its decision,

> "* * * We arrive at this conclusion on the theory that the parties entered into the agreement using the Washington practice and procedure as the 'yardstick.' Indeed, it does not appear that the defendant contested the application of such 'yardstick' in the Virginia suit, but if he did it was disregarded by the Court. Regardless of the partnership practice of deducting only certain limited items it would appear with some logic that in the Virginia action defendant could have advanced the theory that he had certain other deductible items of expense over and above those used in the partnership practice, namely the type of deductions which he now seeks to assert in the present action. * * *" (Tr. 36-37)

In its decision, the District Court said:

> "* * * As to plaintiff's first claim based on the Virginia judgment the defendant admits the same and offers no defense. His time for appeal in Virginia being long since past the matters therein passed upon are res adjudicata and binding on this Court. * * * " (Tr. 33-34)

The "SCHEDULE OF COMPUTATIONS OF AMOUNTS" shows on page 3 thereof that the claim on the Virginia judgment included the following amounts:

Principal of Virginia judgment—	$10,357.34
Interest at 6 percent per annum on each of the amounts itemized in the Virginia judgment from their respective due dates to February 1, 1958—	4,009.80
Cost in the Virginia action—	99.20
Total amount due on Virginia judgment—	$14,466.34

In addition to being *res judicata* as to these amounts involved in the Virginia judgment, that judgment was *res judicata* and binding on the United States District Court for the District of Nevada as to all matters therein passed upon by the Virginia court, including that court's interpretation of the contract. The District Court has followed the Virginia court's interpretation of the contract as to what constitutes the appellant's "net income" and as to what constitutes "usual, ordinary and reasonable office expenses." The District Court also followed the Virginia court's construction that the payments due from the appellant to the appellee for any one year are determined by his net income of the preceding year. (Tr. 34, 35 and 37)

In this connection, it should be observed that at the time of the institution of the Virginia action and during its pendency, the appellant was living in Nevada and was attending a medical meeting in Bath County, Virginia, and was personally served with process in the Virginia action. His present defense was available to him in the Virginia action. (Tr. 31-32 and 40) Consequently, the Virginia judgment would be *res judicata* of his present defense even if he had not raised it in the Virginia action. *Cromwell* v. *County of Sac,* 94 U.S. 351, 352-353; *Lumber Co.* v. *Buchtel,* 101 U.S. 638.

CONCLUSION

It is respectfully submitted that judgment of the United States District Court for the District of Nevada should be affirmed.

Respectfully submitted,

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Attorney for Appellee